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ABDUL AZIZ ISMAIL

v.

PP

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COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: W-05-150-2011]

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24 SEPTEMBER 2013

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Accused person convicted for offence of trafficking in drugs - Sentenced to death - Whether prima facie case established - Whether there*

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was proper evaluation of evidence - Whether trial judge correct in arriving at findings of fact - Whether defence rebutted presumption of trafficking - Principle enunciated in Mohamad Radhi Yaakob v. PP - Whether applied - Dangerous Drugs Act 1952, s. 39B(1)(a)

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Conviction and sentence - Appeal against - Whether prima facie case established - Whether there was proper evaluation of evidence - Whether trial judge correct in arriving at findings of fact - Whether defence rebutted presumption of trafficking - Principle enunciated in Mohamad Radhi Yaakob v. PP - Whether applied*

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In the High Court, the appellant was convicted for trafficking in drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and was sentenced to death. The appellant was arrested by the police at a clinic. He was seen leaving the security

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guard's post and walking towards the back area of the clinic. After a few minutes, the police saw the appellant walking out from the back of the clinic, carrying a paper bag in his hand. The police sprung into action and the appellant panicked, looked scared and struggled. When the contents of the paper bag were inspected,

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three slabs of substances were found and later confirmed to be 2696g of cannabis. In the present appeal, the appellant submitted that (i) there was an improper evaluation of evidence when making a finding of *prima facie* case; (ii) the trial judge made wrong findings of fact; (iii) the trial judge did not make any findings as to

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whether the defence had rebutted the presumption of trafficking and had failed to consider and apply the principle enunciated in the case of *Mohamad Radhi Yaakob v. PP* ('*Radhi*'s case).

Held (allowing appeal and setting aside conviction and sentence)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) The trial judge failed to address the challenges made by the defence during the cross-examinations of the prosecution witnesses, namely as to the version that the drugs were placed at the scene by another person. There was no maximum evaluation of the evidence at the end of the case for the prosecution by the trial judge before she made a finding of a *prima facie* case. This was contrary to the mandated provisions of s. 180 of the Criminal Procedure Code. (para 5)

(2) The trial judge had made a few findings of fact that were perverse or contrary to available evidence in the course of considering the defence story. There was also no deliberation or consideration as to whether the appellant had rebutted the presumption of trafficking under s. 37(da) of the DDA, that was invoked against the appellant. There was no such finding. The non-direction was contrary to the accepted practice of the principle enunciated in *Radhi*'s case. The proper direction was for the court to consider whether on a balance of probabilities, the appellant had rebutted the presumption of trafficking. This is a separate exercise by itself. (para 5)

(3) There were reasonable doubts in the prosecution's case. The conviction was therefore not safe. In view of the various errors in the findings of fact and the fatal misdirection of the trial judge, there were merits in the appeal by the appellant. The conviction and sentence of the High Court were set aside and in substitution, the appellant was ordered to be acquitted and discharged of the offence. (paras 6 & 8)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, perayu telah disabitkan kerana mengedar dadah, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan dijatuhkan hukuman mati. Perayu ditangkap oleh pihak polis di sebuah klinik. Dia dilihat meninggalkan pondok pegawai keselamatan dan berjalan ke arah kawasan belakang klinik. Selepas beberapa minit, pihak polis melihat perayu berjalan keluar dari belakang klinik sambil membawa sebuah

beg kertas dalam tangannya. Pihak polis bertindak dan perayu cemas, kelihatan takut dan meronta-ronta. Apabila kandungan beg kertas tersebut diperiksa, tiga mampatan serbuk dijumpai dan kemudiannya disahkan sebagai 2,696g ganja. Dalam rayuan ini, perayu menghujahkan bahawa (i) terdapat penilaian tidak wajar ke atas keterangan ketika membuat dapatan kes *prima facie*; (ii) hakim bicara khilaf dalam dapatan faktanya; (iii) hakim bicara tidak membuat dapatan sama ada pihak pembelaan berjaya menyangkal anggapan pengedaran dan gagal mempertimbangkan dan mengguna pakai prinsip yang termaktub dalam kes *Mohamad Radhi Yaakob v. PP* ('kes *Radhi*').

Diputuskan (membenarkan rayuan dan mengenepikan sabitan dan hukuman)
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara gagal mempertimbangkan bantahan-bantahan yang dibuat oleh pihak pembelaan semasa pemeriksaan balas saksi-saksi pendakwaan, khasnya mengenai versi bahawa dadah-dadah tersebut telah diletakkan di tempat kejadian oleh orang lain. Tiada penilaian maksimum ke atas keterangan ini di hujung kes bagi pihak pendakwaan oleh hakim bicara semasa beliau membuat dapatan kes *prima facie*. Ini bercanggah dengan peruntukan-peruntukan yang dimandatkan di bawah s. 18 Kanun Tatacara Jenayah.

(2) Hakim bicara telah membuat beberapa dapatan yang bertentangan atau bercanggah dengan keterangan sedia ada, dalam mempertimbangkan cerita pembelaan. Tiada juga huraian atau pertimbangan tentang sama ada perayu telah menyangkal anggapan pengedaran di bawah s. 37(da) ADB, yang dibangkitkan terhadap perayu. Tiada dapatan sedemikian. Ketiadaan arah diri ini bercanggah dengan amalan yang diterima pakai termaktub dalam kes *Radhi*. Arah yang tepat adalah bagi mahkamah mempertimbangkan sama ada atas imbangan kebarangkalian, perayu telah menyangkal anggapan pengedaran. Ini adalah langkah asing yang berdiri dengan sendirinya.

(3) Terdapat keraguan munasabah dalam kes pihak pendakwaan. Sabitan adalah dengan itu tidak selamat. Melihatkan pada pelbagai kekhilafan dalam dapatan fakta dan salah arah hakim bicara yang menjejaskan, terdapat merit dalam rayuan perayu. Sabitan dan hukuman oleh Mahkamah Tinggi diketepikan dan sebagai ganti, perayu diperintahkan agar dibebaskan dan dilepaskan daripada kesalahan yang dipertuduhnya.

Case(s) referred to:

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

Nagappan Kuppusamy v. PP [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229 SC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 180

Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

For the appellant - Ameenuddin Mohamed Ibrahim; M/s Ameen Harbhajan & Co

For the prosecution - Farah Ezlin Yusof Khan; DPP

[Editor's note: For the High Court judgment, please see PP v. Abd Aziz Ismail [2012] 1 LNS 486.]

Reported by Najib Tamby

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] The appellant was convicted and sentenced to death for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") by the Kuala Lumpur High Court. The charge, for which the appellant was convicted, reads as follows:

> Bahawa kamu pada 19 Ogos 2009 jam lebih kurang 3.10 petang, di hadapan Klinik Ibu Mengandung dan Kanak-Kanak, Jalan Hang Tuah, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur telah mengedar dadah berbahaya iaitu Cannabis sejumlah berat 2696 gram dan dengan itu kamu telah melakukan satu

kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] The appellant appealed against his conviction and sentence. On appeal, we allowed the appeal and set aside the conviction and sentence. We now give our reasons.

Facts Of The Case

[3] For ease of reference, we shall reproduce the facts as appeared in the respondent's written submission:

> On 19.08.2009 at 2.30 pm, Insp. Mohd Normal Hisyam bin Malkan @ Molkan (SP5) went to Klinik Ibu Mengandung dan Kanak-Kanak at Jalan Hang Tuah, Kuala Lumpur.
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> SP5 together with D/L/Corp. Hairuddin bin Mishoon (SP2) was in a car stationary at the gate (marked "Z" position as per exhibit P6D) about 15 meters from the clinic. They observed for 20 minutes.
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> According to SP2 and SP5, they saw the appellant leaving the security guard's post and walked towards the back area of the clinic. After a few minutes, both then saw the appellant walking out from the back of the clinic carrying a white bag in his hand.
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> Quickly, SP5 instructed SP2 and L/Corp. Nasry (another policeman who was in the same car with them) to arrest the appellant. As they approached SP5 introduced himself as "Police" and took the white "Lacoste" paper bag from him and handcuffed the appellant.
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> According to SP5, the appellant looked "takut dan menggelabah" and as he was handcuffing the appellant, he was struggling ("meronta-ronta").
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> SP5 then inspect the contents of the white "Lacoste" paper bag, witnessed by SP2 and the appellant, found inside 3 slabs of ganja. He then seized the items and brought the appellant to the police station where he then hand over to the Investigating Officer, Insp. Prakphat a/l Tim (SP6).
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> The chemist, Puan Mainmoonah binti Sulaiman (SP3) analyzed the seized substance and testified that it contains cannabis weighing 2696 gram.

Contentions By The Appellant

[4] Learned counsel for the appellant canvassed the following grounds in support of the appeal:

(i) improper evaluation of evidence when making a finding of *prima facie* case;

(ii) learned trial judge made wrong findings of fact;

(iii) learned trial judge did not make any finding as to whether the defence has rebutted the presumption of trafficking; and

(iv) in relation to the above, the learned trial judge failed to adequately consider and apply the *Radhi*'s directive.

Our Findings And Conclusion

[5] Upon perusal of the records of appeal and after hearing the submissions of both parties, we hold that:

(a) There was no maximum evaluation of the evidence at the end of the case for the prosecution by the learned trial judge before she made a finding of a *prima facie* case. This is contrary to the mandated provisions of s. 180 of the Criminal Procedure Code. In her grounds of judgment (at p. 84 of the appeal records) the learned trial judge merely stated as follows:

> The court found the evidence of the 6 witnesses to be consistent, credible and reliable. The court was satisfied that based on the evidence adduced by the 6 witnesses the prosecution had succeeded in proving on a *prima facie* basis the following ingredients on the offence of drug trafficking which the accused was charged with:

The learned judge failed to address the challenges made by the defence counsel during the cross-examinations of the prosecution witnesses, namely as to the version that the drugs were placed at the scene by a person named Bidin. Such failure is prominent when it was on record that SP5, Insp. Mohd Normal Hisyam (at p. 45 of the appeal records) testified, during cross-examination, as follows:

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Pada 19.8.2009 selepas Tertuduh ditangkap, Bidin ditangkap dan kedua-dua mereka dibawa ke IPK, Kuala Lumpur dan pada 20.8.2009 Bidin dihantar ke lokap di Bukit Jalil.

B (b) That the learned trial judge had made a few findings of fact that are perverse or contrary to available evidence. These are findings by the learned trial judge in the course of considering the defence story. The perverse findings can be found at pp. 100 and 101 of the appeal records.

C At p. 100, the learned judge wrote: "Secondly, how could he be working as a security guard at the clinic when he could not even give the name of his employer?" We perused the notes of evidence, but we could find such evidence. On the contrary there is evidence to show that the appellant named two D persons who were his supervisors, namely Sister Fauziah and Sister Zuraidah.

At p. 101, the learned trial judge wrote: "Fourthly, the court was satisfied that Bidin did not exist in real life and was a E figment of the accused's imagination. It was also concocted and fabricated by the accused from the very beginning of the trial in order to evade criminal liability for the cannabis which the police found on him. If what he had said about the existence of Bidin is true, the I.O. would have no problem in F locating Bidin since he could give a good description of Bidin as well as the floor and the block of flats where Bidin resided".

This finding is obviously contrary to the evidence of SP5, who testified that the character Bidin was arrested on the same G day, ie, on 19 August 2009 and both the appellant and the said Bidin were taken to IPK Kuala Lumpur and that on 20 August 2009 Bidin was sent to the Bukit Jalil lock-up (see p. 95 of the appeal records, as stated earlier in para. (a) above).

H (c) From the grounds of judgment too, we could not find any deliberation or consideration as to whether the appellant had rebutted the presumption of trafficking under s. 37(da) of the DDA, that was invoked against the appellant. There was no such finding.

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This non-direction is contrary to the accepted practice known as the *Radhi*'s directive. The proper direction is for the court to consider whether on a balance of probabilities the appellant had rebutted the presumption of trafficking. This is a separate exercise by itself. To appreciate such a situation it is appropriate to refer to the case of *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 at p. 315, where the Supreme Court held as follows:

> In this connection, Counsel for the appellant had referred to us the case of *PP v. Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the Judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found the learned trial Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[6] In the light of such fatal misdirection by the learned trial judge and coupled with findings that are contrary to available evidence, we are of the considered opinion that there are reasonable doubts in the prosecution's case. In the upshot too, we are of the view that the conviction is not safe.

[7] It is also our judgment that it is trite law that an accused person in a criminal trial need not prove anything. The burden of proving the case beyond reasonable doubt is always on the

prosecution. The Supreme Court in *Nagappan Kuppusamy v. Public Prosecutor* [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229, at p. 231; [1988] 2 MLJ 53, at p. 54 had succinctly stated as follows:

> Here we have to go back to first principles. In a criminal proceedings, the onus on the prosecution throughout is to prove beyond reasonable doubt. From the beginning to the end, the burden remains on the prosecution to prove the guilt of the accused. At the close of the whole case, the court has to consider all the evidence adduced by both the prosecution and the defence and has to be satisfied that the case has been proved beyond reasonable doubt.
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> In other words, at the close of the whole case, the court has to consider all the evidence before it whether they satisfy all the ingredients of the offence. If upon the whole evidence the court is left in a real state of doubt, the prosecution is said to have failed to satisfy the onus of proof which lies upon it.
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> How much evidence is to be adduced depends on the nature of the requirement. Where the burden is shifted to the defence by a statutory presumption, the test in *R v. Carr Briant* and adopted in *Public Prosecutor v. Yuvaraj* would be applied as applied in civil proceedings, namely, on the balance of probabilities.

[8] In view of the various errors in the findings of fact and the fatal misdirection by the learned trial judge, it is our judgment that there are merits in the appeal by the appellant. For the above reasons, we allow the appeal. The conviction and sentence by the High Court are set aside and in substitution thereto we order that the appellant be acquitted and discharged of the offence he was charged with.